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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 135

VINCENT JAMES FINAZZO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BURNS and MANTHO,
By: George Gregory Mantho,
Suite 1826 Guardian Building,
Detroit 26, Michigan,
Counsel for Petitioner.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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No.....

VINCENT JAMES FINAZZO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming his conviction for violation of United States Code, Sections 4704 (a), 4705 (a), Title 26, and Section 174, Title 21.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported; a copy of the opinion is printed as appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1961, and a petition for rehearing was denied on April 4, 1961. The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1).

STATUTES INVOLVED

Section 4704 (a), Title 26:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession the same may be found."

Section 4705 (a), Title 26:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Section 174, Title 21:

"Who ever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

QUESTIONS PRESENTED

1. Was it not prejudicial error to admit evidence of conversations allegedly held during a period eight (8) months prior to the arrest of the petitioner between the petitioner and one, Andrew Bottancino, a convicted narcotic felon, who had prior to such conversations been arrested and plead guilty to an offense contained in the subsequent indictment of the petitioner, and who had not as of the date of the trial of the petitioner been sentenced, and who

entered the petitioner's place of business by stealth and subterfuge, and who was carrying concealed upon his person a microphone and a miniature radio transmitter, thus causing the conversations to be radioed to the world outside, where they could be picked up by agents of the United States Treasury Department, Narcotic Division and officers of the Detroit Metropolitan Police Department, such evidence consisting of the testimony of the aforesaid agents and police officers adduced not from secondary evidence consisting of notes, either completely reproduced by means of stenographic or shorthand methods, or partially reproduced by notes of the agents and officers, but where such evidence consisted of memory recall by such officers and agents of several conversations, which allegedly took place some eight (8) months prior to their testimony, and further, where the said Andrew Bottancino was produced at the time of the petitioner's trial and who testified as to the conversations which he held with the petitioner?

2. Whether testimony of conversations not in the presence of the petitioner, wherein such testimony although limited to what the witness said, but resulting in the total conversations being conveyed to the jury through adept examination and replete with pure hearsay testimony affects a "substantial right" of the petitioner?

STATEMENT OF FACTS

The statement of facts, of necessity, must evolve from the testimony of Andrew Bottancino, incredible as it was; Andrew Bottancino, a convicted narcotic felon (R. 40a) was arrested on June 8, 1959, and plead guilty on November 19, 1959, following an attempt to sell heroin to an undercover agent on May 28, 1959. Vincent James Finazzo was

indicted on February 24, 1960 for his alleged participation in the events of May 28, 1959.

Approximately in the month of April, 1959 while working, Andrew Bottancino received a telephone call (R. 14a) from an unidentified man who asked if Bottancino could "get rid of two kilos of heroin" (R. 15a). Although Bottancino was a convicted narcotic felon and who by his own admission, familiar with individuals in the narcotic business (R. 16a) and, therefore, we must assume one that would be aware of the dangers of such a conversation with an unidentified person, responded that he would look around for a potential purchaser (R. 15a). It is evident that Bottancino was well aware of "individuals in the narcotic business" because shortly thereafter, he contacted Percy and Marion Jackson, who Bottancino testified, he knew were in the narcotic business (R. 49a). Bottancino further testified that he received additional calls from this unidentified caller, some six or seven (R. 12a); with the last call, agreement was finally reached for the caller to provide a sample for Bottancino's purchasers. A meeting was then scheduled for May 28, 1959, on the corner of Michigan and Trumbull, the site of Tiger Stadium, and the advance ticket sales department of the professional baseball team. Particular attention is drawn to this fact, since Bottancino testified that when he went to this meeting he did not know who he was to meet (R. 54a); that he did not have a description and, further, that he would not have done business if he had seen anyone he did not recognize (R. 55a). The patent incongruity of this story is apparent when one considers the location of the meeting, and the total absence of any description to guide Bottancino, especially when he testified that he recognized the petitioner when he drove up in his car, when on direct and cross-

examination he testified that he had not seen the petitioner in over ten years (R. 9a), then only as a boy in the neighborhood to whom he would nod "hello" (R. 9a), and to whom he had *never* talked (R. 45a).

Once in the car Bottancino continued, a short conversation ensued, and ultimately he called the Jacksons to tell them he had the sample; during the drive to the Jackson home he received a small package from the petitioner which he did not examine (R. 24a), and little, if any conversation occurred (R. 23a). It is necessary to deviate momentarily so that it may be pointed out that with the Jacksons was an undercover agent, known to be such by them, and in the immediate vicinity were two teams of agents and officers, ready to conduct a field test on the sample and institute surveillance procedures. The importance of these facts is readily discernible since none of these men were able to place the petitioner at the scene, nor record the license number of the car petitioner allegedly drove, despite the fact that according to Bottancino, the petitioner dropped him off within several houses of the Jacksons' (R. 27a). After leaving the car, Bottancino testified that he proceeded to enter the Jackson home, and there he met Agent Lewis and the Jacksons, although at this point he was not afare that Lewis was an undercover agent (R. 58a). Agent Lewis and Marion Jackson left on the pretense of checking the sample; after approximately a half-hour they returned and told Bottancino the sample was weak, to determine this, Bottancino testified he used a quantity himself to see how strong it was (R. 58a), then after a period of time he left the Jackson home.

After leaving, Bottancino testified he walked around the neighborhood awhile, then the petitioner picked him up

and drove him home (R. 35a), and further, that he did not hear from the petitioner after May 28, 1959, except on several occasions when he, Bottancino, went to the petitioner's place of business (R. 59a). The fact that Bottancino sought out the petitioner was brought out on cross-examination, and during this cross-examination Bottancino testified that the visits to the petitioner were not as a result of any suggestion by agents (R. 62a), and, in fact, he testified that other than at the arraignment, he had not been in contact with any agent between May and December, 1959 (R. 64a). Further, it was brought out that the petitioner did not at any of these visits indicate knowledge of any heroin, or sample he was supposed to have given Bottancino (R. 62a). On re-direct examination, the government elicited these further facts from Bottancino: that he was arrested in June of 1959; shortly after May 28, 1959; that he plead guilty in November, 1959; and that, in addition, as of the trial date, *April 14, 1960*, he was still free on bond and had not been sentenced. That when he made these "visits" to the petitioner he was equipped with a radio device, and under the instruction and supervision of agents and officers with whom he had been in constant contact since the date of his arrest. In addition, the government then proceeded to examine him minutely on each conversation, although on direct examination this was completely ignored. It is not necessary to speculate on the motives of the government, they were clear, this testimony was avoided by design, and the answers Bottancino gave on cross-examination indicate clearly that he was told it should be avoided.

Agent Lewis was then called as a witness; he testified as to what occurred in the Jackson home between himself, the Jacksons and Bottancino. Objections were properly

raised with reference to the hearsay aspects of this testimony, and to its relevance. Agent Lewis testified at length to conversations and acts which did not occur within the presence of the petitioner, the court ruling that only what the witness himself said and did would be received; the patent fallacy of this ruling is apparent with a reading of the record, since by testifying to half the conversation, the witness conveyed the context of the entire conversation.

Agent Panich was next called, and he testified to the tests which were conducted on the sample given by Bottancino to Agent Lewis. There was no testimony this agent could offer as to the petitioner, unless the following testimony would be interpreted as such (R. 94a):

> "Q. And did you see the person who was driving this automobile?
>
> A. Yes, sir, we were parked on Willis, which is one block south of Canfield; we were facing east. While we were parked there, keeping Mr. Bottancino under observation, the Chevrolet that I have just described (1956 or 1957 Chevrolet) passed us *going at a very slow speed.** We looked up and observed the occupant of the car, although at that time we placed no significance on it.
>
> Q. Can you give us a description of the occupant?
>
> A. Yes, the occupant would be described generally as about 5 foot 5 or 6, fairly stocky, with dark hair."

Once again, and not offered in an argumentative light, it must be noted that this agent *did not* testify as to the license number of the car, despite its slow speed, nor did he

---

*Emphasis is that of writer.

testify to an exact description of the petitioner. Additionally, the description offered in his testimony must be considered in the perspective of the fact that the petitioner had been under observation for eight months previous to arrest, and the car impounded on the date of arrest, a car incidentally, belonging to his mother. In passing one cannot help remarking about the amazing powers of perception possessed by this agent, which enabled him to note the height and build of the occupant of the car while he was sitting down, rather incongrous when one considers that this trained agent and his fellow officers did not record the licence number.

Detective Nodolski who was present with Agent Panich and Detective Hisson, testified substantially as did Agent Panich, with the exception that he was able to additionally describe the occupant of the car which passed the three officers by nationality, note (R. 101a):

> "A. Then I recall Maurice Hisson drew my attention to the fact that this Chevie was cruising past Willis on Russell, going north on Russell. I looked up and I observed a white man behind the wheel of this car.
>
> Q. The same automobile?
>
> A. Yes, it was a 1956 or 1957 Chevrolet; it had an ivory top to it and a gold or yellow bottom.
>
> Q. What did this car do?
>
> A. Well, when Maurice Hisson made this remark, I observed the man, a white man behind the wheel. *He appeared to be Italian to me.** He had dark hair."

Strangely enough, neither witness definitely identified the petitioner as the occupant, although their testimony could leave little doubt in the minds of the jury.

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*Emphasis is that of writer.

Agent Evans then testified that he was present during the field test conducted by Agent Panich, and to the fact that a portion of the contents of the package produced by Agent Lewis had been within his control, following the test.

Charles Forest, a government chemist, testified to the analysis of those contents.

The testimony of Agents Marquardt, Adamski, Vernier and Detective Areeda of the Detroit Police Department was in substance, with the exception of Agent Vernier who arrested Bottancino, concerned with their versions of what transpired in the conversation between Bottancino and the petitioner. The testimony of these witnesses revealed that in each of the three conversations portions up to ten minutes were inaudible; in addition, no notes or memoranda were taken by any officer, although each "visit" was planned and executed under the direction of the agents. Each of these witnesses used identical descriptive words supposedly overheard, although the informer himself did not employ them in his version of the conversations. Each agent enlarged upon the testimony of the informer, and in effect, corroborated his fellow officer.

With the completion of this testimony, the government rested, not having called Perez or Marion Jackson, relying entirely upon the testimony of Bottancino to establish the petitioner's alleged participation; the government was unable to produce *one* other witness to testify either to the petitioner's presence at the scene on May 28, 1959, or to any other act indicative of his participation in this crime, although he was under observation for eight months and twenty days prior to his arrest. Conspicuous by its ab-

sence was any testimony of any *subsequent* action of the petitioner which would reveal even a passive participation in this crime.

The case was submitted to the jury, and after five hours of deliberation, a verdict of guilty was returned against the petitioner on three counts: violation of United States Code, Sections 4704 (a), 4705 (a), Title 26, and Section 174, Title 21.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The increasing utilization by federal officers of electronic eavesdropping devices, and the resultant adherence to principles of laziness and lawlessness on the part of law officers, commend the evidentiary problems posed by this case to review by this Court.

1. The time has arrived to call a "halt" as Mr. Justice Frankfurter stated in his dissent in *On Lee v. United States*, 343 U. S. 747, at a place this Court has reached on what he categorized as "the wrong road." In a little over twenty-five years, this Court has progressed from *Olmstead v. United States*, 277 U. S. 438, in which this Court found that voluntary telephone conversations intercepted, and reduced immediately to complete notes, were not in violation of the Fourth and Fifth Amendments; the strong dissent of Mr. Justice Brandies sounded the warning of what would follow, and ignoring the admonition of *Boyd v. United States*, 116 U. S. 676, the "first footing" was achieved by *Olmstead*. Twelve years later in *Goldman v. United States*, 316 U. S. 129, this Court allowed testimony obtained by law officers using a scientific listening device

placed against an adjoining wall, after a prior trespass failed to produce the desired result. Most recently in *On Lee, supra,* an agent was equipped with a radio device and sent to engage an accused in a conversation, which, in turn, was broadcasted to another agent outside, who was allowed to testify to that conversation when the government did not produce the first agent.

The basic tenet relied on was the absence of a "physical trespass"; the absurdity of this theory is evident by the advances made in the field of electronic eavesdropping. So startling are these advances that one shudders at the thought that in this land of ordered liberty they are in constant use by those who profess love of law and order. In *On Lee,* the majority in commenting upon the absence of the agent-informer stated that had he been present he could have testified without objection. In the instant case the evil that is spawned by *On Lee* and companion doctrines becomes readily discernible; petitioner, unlike On Lee, was not under arrest, and the one equipped with the radio device was not an agent, but a convicted narcotic felon awaiting sentence; petitioner did not invite him into his place of business or consent to his presence. Further, the informer was present at the trial and did testify, and did not disclose in his testimony *a single* incriminating statement on the part of the petitioner! Without the *On Lee* decision, the case would have rested with the testimony of the informer; however, the government produced testimony from four law officers regarding these conversations that took place over the period of ten months; each admitting that portions of the conversations were inaudible; in addition, each officer used identical descriptive words *not* used by the informer, and each enlarged on the testimony of the informer. The enlargement is difficult to de-

tect; it is ever so slight, but enough to provide new import to an otherwise innocent conversation. As an illustration, the informer testified that petitioner in response to his request for heroin replied he did not fool with it (R. 76a); the officers enlarged ever so slightly by adding the word "anymore" (R. 121a). Standing by itself this would appear insignificant; however, it is but one of many examples in this record that disclose the inherent danger in the reception of this type of testimony. It leaves the door open to "dirty business" on the part of law officers, allowing them the opportunity to improve on testimony that they consider weak. This places every accused in like circumstances at the mercy and in the hands of every "petty officer", exposed to whatever moral justification the particular officer might place on his actions, and prey to "men of zeal, well-meaning, but without understanding."

The facts disclosed in this record compel a reappraisal by this Court of *On Lee* and companion doctrines, and this Court must address itself as Mr. Justice Murphy suggests in *Goldman, supra:*

> "To this end we must give mind not merely to the exact words of the Amendment (Fourth), but also to its historic purpose, its high political character, and its modern social and legal implications."

2. The police actions in the instant case were inconsistent with the concept of ordered liberty embodied in the due process clause of the Fifth and Fourteenth Amendments. If this Court was shocked by the "revolting" police conduct in *Irving v. United States*, 347 U. S. 128, I respectfully address their attention to these facts: the petitioner was not arrested for a period in excess of eight months following the alleged offense; the informer out-

fitted by the agents with the radio device was arrested ten days after the offense, placed on personal bond *after* a plea of guilty, and *not* sentenced. Ten days following petitioner's trial, the informer was brought before the Court and the plea previously received was set aside, he was then arraigned and plead guilty, and sentenced all the same day to a lesser offense. Consider, in addition, that during the trial the government did not disclose the aforedescribed conversations on direct examination; in fact, the informer denied he had been in contact with the government. Once the cross-examination was completed, the government *then* introduced in minute detail the three radio conversations, and the informer revealed his close association with the agents.

This Court should consider as did Justice Washington in *Silverman v. United States*, 166 F. Supp. 838, the relationship between the Fourth Amendment and the due process clause of the Fifth Amendment. The record of this case discloses what will happen if this court continues to encourage lazy and immoral police conduct. It should be noted that petitioner could not be placed at the scene of the crime to which the informer plead guilty by anyone but the informer; in addition, the petitioner did not during the eight months' period prior to his arrest, commit one act indicative of any participation in the crime. The total setting of this case demands consideration by this Court of the guarantees of due process granted by the Fifth Amendment; surely, the law enforcement methods utilized were not consistent with the dignity of our philosophy of justice, and this writer is compelled to call attention to *Mesarosh v. United States*, 352 U. S. 1, wherein the Court stated: "The dignity of the United States government will not permit the conviction of any person on tainted evidence."

3. Distinct from the constitutional questions, petitioner urges that his conviction should be reversed in the exercise of this Court's supervisory power over the administration of justice in the lower federal courts. This power encompasses the formulation of evidentiary rules. *McNabb v. United States*, 318 U. S. 332, *Mesarosh v. United States*, *supra*. The court below found as a matter of law that the reception of hearsay testimony did not affect substantial rights of petitioner (App. 20); involved was not an isolated instance of hearsay testimony being brought before the jury, but a record replete with such testimony.

The court allowed the government to examine two witnesses as to conversations and acts which took place out of the presence of the petitioner on the theory that such examination was limited to just what the particular witness himself said, and since he was available for cross-examination it would not be hearsay. This theory results in two major objections; first, by receiving half of the conversation, the import of the *entire* conversation is brought to the jury. Therefore, with adept examination, little, if anything relative to the total conversation is left to the imagination; secondly, it opens the door to a *pure* hearsay answer which once before the jury is seldom corrected by instruction from the court. A reading of the record reveals both objectional results occurred.

The court below ruled that receiving such testimony did not affect a substantial right and was, in effect, harmless error. How the court could arrive at this reasoning is difficult to comprehend. What effect receiving conversations and descriptions of what occurred at a time when the alleged participation of petitioner was not before the jury, had upon the collective minds of the jury must be confined to the domain of speculation, not to emphatic rulings as a

matter of law. The test as laid in *Kotteakos v. United States*, 328 U. S. 780, is:

> "The question is, not were they right in their judgment, regardless of the error or its effect upon the verdict, it is rather what effect the error had or reasonably may be taken to have had upon the jury's decision."

A review of the record will disclose that the effect one might reasonably find the reception of such testimony had, did amount to a deprivation of a substantial right.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

BURNS and MANTHO,
By: GEORGE GREGORY MANTHO,
Counsel for Petitioner,
Suite 1826 Guardian Building,
Detroit 26, Michigan.

May, 1961,
Detroit, Michigan.

APPENDIX

No. 14253

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. VINCENT JAMES FINAZZO, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided March 10, 1961.

Before. MILLER, Chief Judge, O'SULLIVAN, Circuit Judge, and THORNTON, District Judge.

MILLER, Chief Judge. Appellant, Vincent James Finazzo, was found guilty by a jury under three counts of an indictment charging unlawful purchase, possession and sale of a quantity of narcotic drugs, in violation of Sections 4704(a) and 4705(a), Title 26, U. S. Code, and Section 174, Title 21, U. S. Code. He received a sentence of five years imprisonment under each of the three counts, said terms to run concurrently.

Appellant contends that it was prejudicial error for the District Judge to fail to give the jury a cautionary instruction regarding the testimony of an accomplice, who had previously plead guilty to the offense contained in the subsequent indictment of the appellant, who had not at the

time of the trial been sentenced and who was a convicted narcotic felon, whose testimony was in some material respects uncorroborated. Such an instruction was not requested by the attorney for the appellant and no objections or exceptions were made by him at the close of the instructions, as provided by Rule 30, Rules of Criminal Procedure. Appellant relies upon Rule 52(b), which provides that plain errors affecting substantial rights may be noticed although they were not brought to the attention of the court.

There are numerous cases stating that it is the better practice for the trial judge to caution the jury against reliance upon the testimony of an accomplice and against giving credence to such testimony in the absence of corroborating evidence. However, it is also well settled that failure of the trial judge to so instruct the jury is not reversible error. *Caminetti v. United States*, 242 U. S. 470, 495; *Beavers v. United States*, 3 F. (2) 860, 863, C. A. 6th; *Wellman v. United States*, 297 F. 925, 933-934, C. A. 6th; *Tuckerman v. United States*, 291 F. 958, 963, C. A. 6th; *Wishart v. United States*, 29 F. (2) 103, 105, C. A. 8th. See also: *Continental Baking Co. v. United States*, 281 F. (2) 137, 155, C. A. 6th; *Poliafico v. United States*, 237 F. (2) 97, 115, C. A. 6th, cert. denied, 352 U. S. 1025; *Robertson v. United States*, 111 F. (2) 1018, C. A. 6th.

Appellant also contends that it was prejudicial error for the District Judge to receive in evidence testimony concerning conversations between the appellant and an alleged accomplice who was carrying concealed upon his person a microphone and a miniature radio transistor, thus causing the conversation to be radioed outside the room in which it took place to enforcement agents who testified to what they heard.

We are of the opinion that the ruling was in accordance with the Supreme Court decisions in *Olmstead v. United States*, 277 U. S. 438; *Goldman v. United States*, 316 U. S. 129; and *On Lee v. United States*, 343 U. S. 747. Until these cases are overruled or modified by later Supreme Court decisions, they are binding on both the District Court and this Court and must be followed. *Chicago Great Western Ry. Co. v. Peeler*, 140 F. (2) 865, 869, C. A. 8th; *United States v. Ullmann*, 221 F. (2) 760, C. A. 2nd, aff'd, 350 U. S. 422. See also: *The Cold Metal Process Co. v. E. W. Bliss Co.*, ... F. (2) ..., C. A. 6th, decided December 21, 1960.

The accomplice and a narcotic agent testified to certain statements made by them in conversations with persons other than the appellant at times when the appellant was not present. The District Judge limited this evidence to testimony by the witness of what the witness himself said, not receiving in evidence the answers or statements by the other party to the conversation. Appellant contends this was prejudicial error in that no conspiracy was charged in the present case and in the absence of a conspiracy, statements by third parties out of a defendant's presence are inadmissible.

It is well settled that testimony about statements of others made out of the presence of the opposing party is hearsay evidence and inadmissible. *Nelson v. Flint*, 166 U. S. 276, 278. *Armhorst v. Cincinnati Traction Co.*, 25 F. (2) 240, C. A. 6th; *Moffett v. Arabian American Oil Co.*, 184 F. (2) 859, C. A. 2nd, cert. denied, 340 U. S. 948; *Landstrom v. Thorpe*, 189 F. (2) 46, 53, C. A. 8th, cert. denied, 342 U. S. 819. The Government contends, however, that the witnesses did not testify about what the other party to the conversation said and that their testimony about what

they themselves said was not hearsay, and since the witness was subject to cross-examination about his testimony as to his own statements, the evidence was admissible. Strictly speaking, such testimony is not hearsay. But in many instances such testimony, if in enough detail and not limited to a very few statements, will clearly convey to the jury the answers made by the other party to the conversation, even though they are not stated by the witness, and for all practical purposes will have the same result as if the witness had stated what the other party to the conversation said. If the testimony of the witness indicates that it will lead to that result, it should, upon proper objection thereto, be held inadmissible.

In the present case, both the accomplice and the narcotic agent testified as to facts as well as to their conversations. We believe that any material evidence which may have improperly gone to the jury under the hearsay rule was properly before the jury by the factual testimony of these and other witnesses for the Government, and any error in receiving such hearsay testimony did not affect substantial rights of the appellant. *Rule 52(a), Rules of Criminal Procedure; United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 235; *United States v. Crescent Amusement Co.*, 323 U. S. 173, 184.

The judgment is affirmed.

JUDGMENT

The judgment is affirmed.

ORDER

Before: MILLER, *Chief Judge*, O'SULLIVAN, Circuit Judge, and THORNTON, District Judge.

Appellant's petition for rehearing having been considered by the Court,

It is Ordered that said petition be denied.

Approved for Entry:
/s/ Shackelford Miller, Jr.,
Chief Judge, United States Court of Appeals for the Sixth Circuit.

Dated: April 4, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 125

VINCENT JAMES FINAZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-20) is reported at 288 F. 2d 175.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1961 (Pet. App. 21). A petition for rehearing was denied on April 4, 1961 (*ibid.*). On April 25, 1961, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to

and including June 1, 1961. The petition for a writ of certiorari was filed on May 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in not excluding, as the product of an allegedly unreasonable search and seizure, testimony as to admissions made by petitioner at his place of business, overheard on a short-wave radio, where no objection was made at the trial to the method by which such admissions were overheard.

2. Whether certain testimony admitted at the trial was hearsay.

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution provides as follows:

> The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Michigan on all three counts of an indictment charging illegal purchase, receipt, concealment, possession

and transfer of narcotics. He was sentenced to concurrent terms of imprisonment for five years on each count (R. 2-3, 162, 169). The court of appeals unanimously affirmed. The evidence may be summarized as follows:

1. The principal government witness was Andrew Bottancino, who at the time of the trial had pleaded guilty to a federal narcotic offense but had not been sentenced. Bottancino was a former narcotics addict and had served a prison sentence for narcotics violations. At the time of the events here involved, he was employed as a salesman and watchmaker in a Detroit pawn shop (R. 9, 16, 40-41).

Bottancino testified that, prior to the date of the offenses (May 28, 1959), he had received several telephone calls from an unidentified man who wanted him to dispose of two kilos of heroin. Bottancino ascertained that acquaintances of his, Percy and Marion Jackson, might be interested in buying it and arranged a meeting with the anonymous caller (R. 11, 13-16, 19-21). After Bottancino waited at the agreed meeting place for a short time, a 1957 or 1958 Chevrolet drove up. He recognized the driver as petitioner, whom he had known about ten years before, and who identified himself as being the person who had made the calls (R. 21-22, 9). They discussed details of the proposed transaction, including the requirement of a sample by the prospective purchasers and whether it was safe to deal with them (R. 22-23).

Petitioner drove Bottancino to the Jackson residence and gave him a sample of the narcotics. Bottancino

talked with the Jacksons and a third person present who, they said, was going to finance the transaction. This person was a federal narcotics agent named Lewis (R. 26-29, 33). Bottancino testified that he delivered the sample for testing. Lewis took the sample, left the house for half an hour, and returned. Bottancino also testified as to statements he made to Lewis at that meeting—chiefly that the price was $5,500. Bottancino then went back to petitioner's car and informed him that the people he was dealing with objected to the quality of the sample and would not buy unless the price was cut. Petitioner refused to do this (R. 29-36).

On cross examination, Bottancino testified that he had stopped in petitioner's grocery store a few times after May 28 and bought things for the family. On one occasion, they talked about how bad the deal was. Bottancino tried to get some more heroin from petitioner, but petitioner turned him down, saying that he was making a good living. Bottancino also told petitioner about his arrest and warned him to be careful (R. 59-63). On redirect examination, Bottancino testified that he had a small radio transmitter in his belt when he went to petitioner's shop (R. 72-73).

2. Several witnesses corroborated the testimony of Bottancino:

Agent Lewis testified that he met Bottancino at the Jackson residence (R. 82-84), and gave an account of the meeting similar to that given by Bottancino. Lewis' account of his side of the conversation corresponded with Bottancino's statement of what

he had said (*supra*, p. 4). Lewis testified that he left the Jacksons' place for a short time, in order to deliver the sample of heroin to Agent Panich for field testing. The test showed a positive reaction for the presence of an opium derivative. Lewis returned and reported that the sample was weak and that the price was too high (R. 85-86). There were no revenue stamps on the sample (R. 87). A portion of the powder was retained for laboratory testing (R. 89), which showed heroin of 81.5% purity (R. 112-113). The Jacksons knew that Lewis was a narcotics agent (R. 90).

Agent Panich testified that he field tested and got a positive reaction on the sample given to him on the evening in question by Agent Lewis (R. 95). Later he saw Bottancino come out of the Jackson residence and get into a 1956 or 1957 Chevrolet driven by a stocky, dark-haired man (R. 93-94). Agent Nodolski also testified to the latter event, describing the driver of the Chevrolet as a dark-haired man who appeared to be an Italian (R. 100-101).

Agents Marquardt and Adamski testified that on July 13, 1959, they parked their car outside the F and M Bake Shop in Detroit and listened in by short-wave radio on a conversation between petitioner, who was operating the shop, and Bottancino, who had a radio transmitter concealed on his person. Petitioner objected to the testimony of Marquardt on the ground that he could not know who was talking with Bottancino (R. 116-118) and on the further ground that all the conversation could not be heard, due to background noise (R. 119-120). The objec-

tions were overruled. The two agents testified that they could see what occurred through the glass front of the shop. When Bottancino went in, he addressed the petitioner as "Jimmie." He told petitioner that he had received a call from his people the other night and that the stuff petitioner got for them was "dynamite." Most of the conversation was inaudible for a period of ten to fifteen minutes. As Bottancino left, he asked petitioner to let him know if he got any more stuff. Petitioner replied with some profanity that he did not fool around with it any more, as he had a nice business there and didn't have to (R. 119-121, 124-127).

Detective Areeda of the Detroit Police Department testified that on December 28, 1959, Bottancino, again equipped with a short wave transmitter, went into petitioner's bake shop. Areeda overheard the conversation from across the street. Bottancino told petitioner that he got "busted" on the sample which the latter had given him, and that there was a "Fed." in the closet. Petitioner asked if Bottancino had mentioned him and said, "If they ask me anything about it, I don't even know you." (R. 132-134). Agent Vernier, who was with Areeda, corroborated this account (R. 136-141).

ARGUMENT

1. Petitioner's principal contention (Pet. 11-13) is that the action of the law enforcement officers in listening, through a short-wave radio, to conversations in petitioner's place of business between himself and Bottancino constituted an unreasonable search

and seizure in violation of the Fourth Amendment; and that the testimony about those conversations should have been excluded. But petitioner, although represented by retained counsel, made no objection to the introduction of the evidence on this ground. His objections, made only to the testimony of one agent about the overheard conversation, were that the officers who heard it could not know to whom Bottancino was talking; and that, because of background noise, all of the conversation was not audible (see the Statement, *supra*, p. 5). The district court was under no obligation *sua sponte* to exclude evidence on a ground not raised by the objector—particularly since, as we show below, there was no basis for exclusion on such ground.

If the Fourth Amendment issue is properly presented on this record, *On Lee* v. *United States*, 343 U.S. 747, is completely dispositive of petitioner's contention. This Court there held (p. 754) that there was "no violation of the Fourth Amendment" when a federal undercover agent who had a radio transmitter concealed on his person entered Lee's laundry and engaged him in conversation during which Lee made incriminating statements overheard on a receiving set by another agent outside the building. Here, as in *On Lee*, "no trespass was committed" when Bottancino "entered a place of business with the consent, if not by the implied invitation, of the petitioner," and his "conduct * * * did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment" (343 U.S. at 751-752). In the instant case, "the eavesdropping

had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area" (*Silverman* v. *United States*, 365 U.S. 505, 510).

2. Petitioner further contends (Pet. 15-16) that the testimony of Bottancino and Lewis about their attempted negotiation of a purchase of heroin was inadmissible hearsay. Their testimony was not hearsay, however, but direct evidence as to what each witness himself did and said; neither testified as to what the other had said.

The fundamental objection to hearsay is that it permits the introduction in evidence of the statement of a third person without an opportunity to cross-examine such person. That situation was not present here. Both participants in the conversation were present in court and subject to cross examination. Actually, what was said was of little significance. The important point was that Bottancino presented the sample which petitioner had given him and the agent accepted it for the purpose of testing it. The conversation tended to clarify the events which took place and was thus admissible as part of the *res gestae*. See *Stockman* v. *United States*, 8 F. 2d 211, 212 (C.A. 9). Petitioner's point that telling one side of a conversation implies what was said in reply is not pertinent in this case, since both participants testified directly as to what each said and did.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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